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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LEONARD EARL THOMPSON, Defendant and Appellant.	H032991 (Santa Clara County Super. Ct. No. CC314253)

Defendant Leonard Earl Thompson was convicted by a jury of one count of first degree murder (Pen. Code, § 187, count 1)[1] and one count of felony false imprisonment (§§ 236, 237, count 2). The jury also found true the allegations that Thompson intentionally and personally discharged a firearm in the commission of count 1 (§ 12022.53, subds. (b), (c) & (d)) and had personally used a semiautomatic handgun in the commission of count 2 (§ 12022.5, subd. (a)). Thompson was sentenced to an aggregate term of 50 years to life in prison.

On appeal, Thompson contends that there was instructional error and prosecutorial misconduct relative to the provocation element of the lesser included offense of voluntary manslaughter. Thompson further argues that the trial court erred by failing to suspend proceedings to determine whether he was competent to stand trial.

[1] All further unspecified statutory references are to the Penal Code.

We agree that the prosecutor committed misconduct by making incorrect statements about the law of voluntary manslaughter, and that the voluntary manslaughter instruction issued by the trial court was, at a minimum, ambiguous. However, we find that these errors were harmless because Thompson was not entitled to a manslaughter instruction in the first place. We also reject Thompson's arguments that the trial court should have suspended proceedings to determine his competence to stand trial. We therefore affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The People's case

1. Testimony of Dorothy Green

Dorothy Green was a close friend of the victim, Garysha Moore,[2] who had begun dating Thompson in 2000. From 2000 until 2002, Green believed the relationship between Moore and Thompson was "pretty good." Beginning in 2000, Moore was participating in Job Corps and spending the night at its campus in San Jose. When Moore stopped going to Job Corps, it appeared to Green that Moore and Thompson were more "distant" with each other, and they were doing less "girlfriend/boyfriend stuff." At this point, Moore was staying with Green, rather than going home to her mother's house, and Green believed that Thompson was jealous of her. On multiple occasions, Green heard Thompson accuse Moore of cheating on him, and, at least once, Thompson accused Moore of having a sexual relationship with Green.

On numerous occasions, Thompson would take Moore's phone, purse and keys to prevent her from leaving. He would also get mad at Moore and say, "You [*sic*] always trying to run with that bitch [i.e., Green] somewhere. Why you [*sic*] can't stay here with me." Thompson would also follow Green and Moore around, or wait outside Green's

[2] Moore was also known as "Pussycat."

house for the two to return home. Moore would appear to be disgusted or angered by Thompson's behavior in this regard.

In 2003, Moore and Thompson both lived with Green for approximately one month. During that time, Green saw that they were not getting along well, arguing about "[s]tupid things. [Moore] being gone for so long. Why she didn't answer her phone. Where were we." Green believed that Thompson was trying to control Moore. Though Moore did not seem to be happy with the relationship, she continued to play the "boyfriend/girlfriend" role with Thompson.

One night, Moore and Green went to a club together to get away from Thompson and Thompson kept calling them on the phone. Afterwards, they parked about two blocks away from the house, then went home. At about 5:00 a.m., Thompson began pounding on Green's door, saying, "I know you bitches are in there. The light is on. Open the door." Thompson left after a neighbor threatened to call the police.

On or about Valentine's Day in 2003, Moore and Green had driven to San Francisco together and were in the drive-thru lane of a McDonald's restaurant when they were suddenly accosted by Thompson. Thompson began yelling and screaming at Moore, "Why are you down here? I told you don't come down here." He ordered her to get out of the car, and when she refused, he dove in through the passenger window of Green's car. Moore jumped into the rear seat, telling him to get out and that she did not want to go with him. Thompson then pulled out a gun, which he pointed at Green, telling her to start the car and drive off. Thompson and Moore began to argue, and Thompson told her that if she left him, he would kill her. While they were arguing, Green jumped out of the car and started to run, but came back when she heard Moore screaming for her to come back. Moore eventually did go with Thompson, but then tried to run back and he grabbed her. Green did not call the police about this incident.

A number of weeks after the incident at the McDonald's, Moore and her family moved from East Palo Alto to Milpitas. Green stayed over at Moore's house every

evening after the move. Thompson, who had previously shared a room with Moore at her house in East Palo Alto, was still occasionally spending the night with her in Milpitas, though less often than he had before.

On the afternoon of May 18, 2003, Green and Moore went to East Palo Alto to pick up money and a car that Moore shared with Thompson. Thompson came along for some period of time, but Green and Moore later dropped him off and continued to the mall without him. After shopping, Green and Moore dropped Thompson's car off with him at the end of the day, then the two of them returned to Moore's house in Milpitas. At some point that evening, Thompson called Moore on her cell phone. Green, who was sitting close to Moore, could hear Thompson yelling at Moore, asking why Green was still there and saying "She need [*sic*] to be going home. I was going to come over [there], but whatever."

After Moore hung up the phone, Thompson called Moore's mother, Alonda Crooks. Green overheard Crooks tell Thompson, "Boy, shut up. And I'll talk to you later."

Green and Moore slept in the same bed that night. The next morning, they started talking about their plans for the day and watching television, when someone began to bang on the front door. Moore looked out the window and said, "Oh, it's just [Thompson]." She went downstairs and let him in, then returned to the bedroom and got back on the bed with Green. Thompson came into the room about five minutes later and sat down in a chair by the window. Green and Moore continued to watch television and talk and laugh together. At some point, Thompson asked to talk to Moore privately and the two left the room. When they returned, Moore was laughing as if something Thompson had said was funny. She sat down on the bed again and resumed talking to Green, while Thompson sat down in the chair again. He watched television with Green and Moore for a little while, then got up as if he were walking out of the room. He pulled a gun out of his pocket and pointed it at Green's head.

Green yelled at him, "What are you doing? Don't play with me. I don't like guns." Thompson responded, "Bitch, shut up. I'm going to kill your bitch ass. I hate you." Moore began yelling at Thompson, "Don't do that to her. Don't play with her like that." Thompson told Moore to "shut the fuck up," and said "he wasn't playing." He pulled the trigger twice, but the gun did not fire.

Thompson then started hitting Green on the head with the gun, and she fell to the floor. He was dragging and pulling her, but she was able to get away when Thompson began to chase after Moore. Green ran into another bedroom to call 911, but Thompson came back for her and continued to beat her. Moore's younger brothers, who were in the second bedroom, attempted to help Green.

Moore pleaded with Thompson to stop hitting Green, and when he left Green against a wall in the second bedroom, Moore came in and cradled her in her arms, telling her it would be "ok." Thompson began to yell at Moore, "Get up. Fuck her. Leave her. Get up." Moore did not move, and said, "I'm not leaving her. She's hurt. And I need to call my mom for help." Thompson repeated himself, telling Moore to leave Green where she was. Moore refused, and Thompson shot her. Moore fell on top of Green, and Green does not remember what happened after that.

The People played an audiotape of a 911 call made immediately after the shooting. Green testified that she did not remember making the call, but acknowledged it was her voice on the recording. In that call, Green told police that Thompson had tried to shoot her and that he had shot and killed Moore.

2. Theodore and Cindy Winterbauer

On the night of May 17, 2003, Theodore Winterbauer invited some friends, including Thompson, over to his house for a barbecue. Thompson spent up to 20 minutes in Winterbauer's bedroom, ostensibly to get his coat or change his clothes. Winterbauer kept a loaded 9mm handgun in a locked case in his bedroom. When Winterbauer later learned that Moore had been shot two days after the barbecue, he checked to see if his

gun was missing, and it was. Thompson had not asked Winterbauer if he could take the gun, nor did Winterbauer give him permission to do so. When shown a digital image of the gun which was used to kill Moore, Winterbauer said that it was his.

Cindy Winterbauer testified Thompson spoke to her at the barbecue and told her that he and Moore were having problems. He wanted Moore to spend more time with him.

3. Eric Jones

Eric Jones, one of Moore's younger brothers, testified that he woke up on the morning of May 19, 2003, because he heard fighting in the house. He ran into his mother's bedroom where he found three of his brothers, along with Moore, Green and Thompson. He saw Green sitting by the closet, crying, and Moore was hugging her. Thompson was standing over the two of them, two to three feet away, and Jones saw him pull a gun out of his right pocket and shoot Moore. Thompson then put the gun under his chin and shot himself. After that, Thompson, dazed and his face bleeding, seemed to be looking for the gun which he had dropped after shooting himself. Jones heard him ask, "Where is the gun?" Thompson left the room and went downstairs, but came back with a knife, which he used to cut his wrist.

4. Alonda Crooks

Crooks testified that Moore and Thompson dated for approximately three years before the shooting, and that while it began well, the relationship changed in the last year or two. The two began arguing and fighting. Thompson would complain about Moore not spending enough time with him and was upset that she spent so much time with Green.

On the night before the shooting, Thompson called Crooks and told her that something bad would happen the next day. Crooks asked what he was talking about and he said he would "do something to hurt [Green]." Thompson said he was going to shoot

Green and then shoot himself. Crooks, who felt she knew Thompson well, thought that he was just "talking big" and did not think anything of his threat.

5. Officers Dennis Kraft and Mark Doyle

Officer Dennis Kraft testified that he responded to a call of a disturbance and made contact with Green down the street from Crooks's house. Green appeared to be hysterical and was bloody, though she told Officer Kraft she was not injured. When he arrived at Crooks's house, Officer Kraft observed Thompson partially hanging out of an upstairs window. Thompson had blood on his hands and face. Officer Kraft asked him where the woman was, and Thompson responded that he had shot her and that she was dead. Thompson repeatedly told Officer Kraft, and the other officers who had arrived on the scene, that he wanted them to shoot him. Thompson came out of the house and was handcuffed. While handcuffing him, Officer Kraft noted that Thompson had many cuts on both arms, some as long as three inches. He also saw that he was bleeding heavily due to major trauma to his jaw area, though he could not tell if it was caused by a gunshot.

Officer Mark Doyle was standing near Thompson after he had been handcuffed and heard Officer Kraft ask Thompson, "What happened today?" Officer Doyle did not hear any response, but as he got closer to Thompson, he could hear Thompson mumbling, and heard the word "note." At the same time, Thompson, who was lying on his side on the ground, gestured towards his right front pocket. One of the officers retrieved a note from Thompson's pocket. There was no blood or smudges on the note. The note itself appeared to have been written in both ink and pencil.

Thompson's signature appeared on one side of the note,[3] along with the following: "I Love pussycat"; "to all my G-Town homes *Im* sorry. See what love did to me. Fuck the world. If I *cant* have her no one can"; "I was not *playin what I say*"; "all because of *dorthy*"; "*Im* going to miss everybody"; "put *use side by sid* when we die"; and "fuck it."

[3] Italicized portions denote spelling and grammatical errors in the original.

The other side of the note reads as follows: "give *ted the my* car"; "this for everybody that love *use*. I did this *becous dorthy* is in the way. I *cant spin* no time with pussycat *becaus* she *all ways ther*, pussycat is the only girl that I ever loved. I hope everybody *dont for get* me. I will kill for her. All of this is because *dorthy*. Love everybody."

6. Forensic evidence

The autopsy revealed that Moore was killed by a single gunshot to the head, which lacerated her brainstem, resulting in instantaneous death. The gun was fired from close range, anywhere from one inch to three feet away. The murder weapon was the gun taken from Winterbauer's residence.

B. The defense case

Thompson offered no evidence in his defense. His counsel acknowledged that Thompson had killed Moore, but argued that his crime was voluntary manslaughter, not murder, because the killing was a rash and impulsive act, carried out in the heat of passion.

II. DISCUSSION

A. Claims relating to the provocation element of voluntary manslaughter

1. Prosecutor's statements regarding provocation

In opening argument, the prosecutor stated that the element of provocation, in the context of voluntary manslaughter, "requires that the defendant be provoked. And as a result of that provocation, the defendant acts rashly and under the influence of intense emotion . . . [t]hat is acting out of passion rather than judgment." The prosecutor expanded on this concept by stating, "What that means is the person such as you, average person of average disposition, would you kill because of such a provocation? [¶] . . . [T]he fact is, if you try to argue provocation, you, ladies and gentlemen, need to sit there and say, if there was any sort of provocation, would it cause me to kill."

Defense counsel objected, but the objection was overruled by the trial court. The prosecutor continued, "So you need to ask yourselves would this cause the average

person to kill? [¶] Would this cause me to kill? [¶] If not, it's not voluntary manslaughter."

After defense counsel argued to the jury that the standard did not "mean that the average person would have to commit an unlawful killing," the prosecutor's closing argument reiterated that, in order for the crime to be voluntary manslaughter instead of murder, the events described would have to "comprise[] provocation that would lead someone to kill," and that even the events described at trial did not "rise to the level where you or me or society would consider it enough to provoke someone to kill."

Thompson contends that the prosecution's argument repeatedly misstated the law regarding the provocation element of voluntary manslaughter. We agree.

A defendant commits voluntary manslaughter, not murder, when he or she unlawfully kills another person "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) "The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. . . . '[*T*]*his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances*,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, *unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man*.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253, italics added.)

In *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*), the trial court instructed the jury on voluntary manslaughter. In arguing the case to the jury, the prosecutor focused on the killer's response to the provocation, contending that it was disproportionate as the provocation would not cause an average person to kill. On appeal, the court concluded that this argument was erroneous and improper, explaining

that "[t]he focus [of a heat of passion defense] is on the provocation--the surrounding circumstances--and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion."[4] (*Id*. at p. 223.)

This analysis reinforces the long-standing, qualitative standard for provocation; i.e., that it be sufficient to cause an ordinarily reasonable person to act from passion rather than judgment. (See *People v. Logan* (1917) 175 Cal. 45, 49 [provocation "sufficient to arouse the passions of the ordinarily reasonable man"]; *People v. Manriquez* (2005) 37 Cal.4th 547, 583-584 [conduct "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection"].) More importantly, the *Najera* analysis protects the qualitative standard from being distorted by the quantitative notion that provocation must reasonably trigger a certain heightened level of reactive conduct, specifically lethal force, in order to reduce murder to manslaughter. Such a notion is erroneous. What negates malice is simply *a state of mind obscured by passion*. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) That state of mind can be induced by any violent, intense, or enthusiastic emotion, except revenge, including anger, rage, and fear of death or bodily harm. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) Thus, in the context of voluntary manslaughter, provocation is sufficient if it would trigger such a state of mind in a reasonable person. It need not further cause a particular *level* of conduct, let alone cause a reasonable person to react with lethal violence.

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[4] The court in *Najera* reached this issue despite having concluded that the defendant forfeited his claim of prosecutorial misconduct by failing to object at trial. (*Najera, supra,* 138 Cal.App.4th at p. 224.) The court also rejected defendant's claim of ineffective assistance of counsel based on the failure to object to the prosecutor's misstatements, concluding the failure to object was necessarily harmless because there was insufficient evidence of provocation to warrant voluntary manslaughter instructions in the first place. (*Id*. at pp. 225-226.)

Accordingly, the prosecutor's statements were incorrect and constituted misconduct. We note that the court, following California Criminal Jury Instructions (CALCRIM) No. 200, instructed the jurors that "if you believe the attorneys' comments on the law conflict with my instructions, you must follow my instructions." Ordinarily, we may presume that jurors would understand and follow that instruction. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) Here, however, that presumption is not reasonable because, as we discuss below, the prosecutor's erroneous argument was not inconsistent, on its face, with the court's instruction and, therefore, jurors had no reason to disregard it.

2. The trial court's instruction regarding voluntary manslaughter

In instructing the jury, the court used the then-operative version of CALCRIM No. 570.[5] In relevant part, the court stated, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or heat of passion if: one, the defendant was provoked; and, two, as a result of that provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; or, three, the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from

[5] Thompson's trial concluded in February 2008 and CALCRIM No. 570 was revised in December 2008. The revised instruction now provides, in relevant part, "It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, *consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment*." (CALCRIM No. 570 (Dec. 2008), italics added.)

The modification cites *Najera, supra,* 138 Cal.App.4th 212, as authority for the proposition that an average person need not have been provoked to kill, but only to act rashly and without deliberation. (CALCRIM No. 570 (Dec. 2008).)

passion rather than from judgment. [¶] Heat of passion does not require anger, rage or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter the defendant must have acted under the direct and immediate influence of provocation as I have defined it. [¶] While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether defendant was provoked and whether the provocation was sufficient. *In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.* [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of sudden quarrel or heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

The court's instruction describes the subjective and objective elements of heat of passion. As to the latter, it instructs jurors that the defendant must have acted as a result of provocation that "would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." (CALCRIM No. 570.) This language conveys the correct standard. (See *People v. Manriquez, supra*, 37 Cal.4th at pp. 583-584 [conduct "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection"].)

Next, the instruction tells jurors that they must decide "whether the defendant was provoked" (the subjective component) and whether "the provocation was sufficient" (the objective component). (CALCRIM No. 570.) To guide the latter determination, the instruction directs jurors to consider: (1) whether an average person would have been

provoked; and (2) how an average person would have reacted under the same circumstances. Thompson challenges the propriety of the second consideration, claiming that it misstates the standard for the sufficiency of provocation. We agree that this part of the instruction could be clearer.[6]

Directing jurors to consider how an average person would react is not *necessarily* incorrect or inconsistent with the correct standard. However, the instruction does not expressly limit the jurors' focus to whether an average person would act rashly. Instead, the challenged language seems to invite jurors to consider what would and would not be a reasonable response to the provocation. More specifically, it allows, and perhaps even encourages, jurors to consider whether the provocation would cause an average person to do *what the defendant did*; i.e., commit a homicide. However, as we explained above, whether an average person would be provoked to kill is not a proper consideration in determining whether provocation was sufficient. Thus, insofar as the instructional language permits the jury to decide a crucial issue based on proper and improper considerations, it is ambiguous.

The mere fact that CALCRIM No. 570 is ambiguous does not, standing alone, establish instructional error. The determinative question is whether "there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

As discussed above, the prosecutor's argument in this case was essentially the same as the improper argument in *Najera*. It reflected the incorrect standard for provocation and invited a misapplication of the instructional language in CALCRIM No. 570. In addition, the trial court overruled the defense's objections to the prosecution's argument, further reinforcing the idea that the jury should consider whether the

[6] The Judicial Council apparently thought so, too. See footnote 4, *ante*.

provocation in question would cause an average person to kill. The court had previously directed the jury to use the challenged instruction as an analytical tool in determining whether provocation was sufficient. Given this direction from the trial court, the instruction's ambiguity, and the prosecutor's improper and erroneous argument, we find a reasonable likelihood that the jury misunderstood how to determine the sufficiency of provocation and erroneously believed that, to be sufficient, provocation had to be such as would cause an average person to react the way Thompson did.

3. Prejudice

Having determined that there was both instructional error and prosecutorial misconduct, we turn to the issue of prejudice.

Thompson contends the instructional error violated his federal constitutional right to due process and, therefore, must be reviewed under the federal standard for prejudicial error set forth in *Chapman v. California* (1967) 386 U.S. 18. However, voluntary manslaughter is a lesser included offense of murder, and it is settled that failing to instruct, failing to give adequate instructions, and giving erroneous instructions on a lesser included offense constitute errors of state, not federal, law. (*People v. Lasko*, *supra*, 23 Cal.4th at pp. 111-113; *People v. Blakeley* (2000) 23 Cal.4th 82, 93; *People v. Breverman* (1998) 19 Cal.4th 142, 164-179.) Thus, we review the error under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818 and determine whether it is reasonably probable Thompson would have obtained a more favorable result in the absence of the instructional error.

The People argue that any error was harmless because there was only minimal and insubstantial evidence to support a theory of voluntary manslaughter. Thompson had often expressed his resentment of Moore's close relationship with Green, and just prior to the killing, Moore and Green were watching television while sitting on Moore's bed, talking and laughing together. The People argue that under the circumstances, "[n]o reasonable person would have been provoked to lose reason and judgment, merely

because his girlfriend was enjoying a television show with her friend." In addition, the People note that Thompson planned the killing before he committed it, as he stole the murder weapon from Winterbauer's house two days beforehand, and, at some unknown time before the shooting, wrote the murder/suicide note police found in his front pocket at the time of his arrest. Given the overwhelming evidence of malice and premeditation and the slight evidence of provocation, it is unlikely that any juror would have had a reasonable doubt about whether Thompson acted with malice even absent the instructional error.

Where there is no substantial evidence which may lead reasonable jurors to conclude that the defendant is guilty of voluntary manslaughter, rather than murder, the trial court need not instruct the jury on that lesser included offense. (*People v. Jackson* (1980) 28 Cal.3d 264, 305, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) "[I]f the evidence which supports a [lesser included offense] is 'minimal and insubstantial,' the trial court need not instruct on that [offense]." (*People v. Jackson*, *supra*, at p. 306.)

With these principles in mind, we turn to the facts of this case. We find evidence of provocation to be slight. Thompson often argued with Moore about the amount of time that Moore spent with Green, rather than with him. The night before the shooting, Thompson was angry to learn that Green was spending the night with Moore, when the two had gone shopping together using Thompson's car that same day. When he came over to Moore's house the next morning, he sat in a picnic chair in Moore's room while Moore and Green watched television and talked and laughed together. He spoke to Moore alone briefly, then after a few more minutes, got up from the chair, pulled out his

gun and pointed it at Green. He pulled the trigger twice, but when the gun did not fire, he began beating Green. Moore tried to defend Green, and then as Green lay on the floor, cradled her and comforted her. It was at this point that Thompson, after Moore refused to leave Green's side, shot Moore in the head at close range. There was no heated exchange of words, no argument, no physical altercation, no taunting, teasing or threats. These events would not have caused an " ' "ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." ' " (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 584.)

Against this evidence of provocation, the evidence of malice and premeditation is overwhelming. Two days before the shooting, Thompson went to his friend's house and stole the gun he used to kill Moore. The night before the shooting, he called Moore and told her that Green needed to go home because he intended to come over. He then called Moore's mother and said he would shoot Green and then himself. When he went to Moore's house the next day, he had a hand-written note in his pocket, in which he had written things like "If I *cant* have her no one can," "*Im* going to miss everybody," "I did this *becous dorthy* is in the way. I *cant spin* no time with pussycat *becaus* she *allways ther*," "I hope everybody *dont for get* me," and "put *use side by sid* when we die."[7] When Thompson shot Moore, attempted to kill himself with both the gun and a knife and finally asked the police to shoot him, he was following through on what he had written in that note.

Since there was no substantial evidence to support the defense theory of voluntary manslaughter in the first instance, we conclude that neither the prosecutor's arguments nor the instructional error was prejudicial.

[7] See footnote 3, *ante*.

B. Claims relating to Thompson's competence to stand trial

1. Factual and procedural background

a. Pretrial

The criminal case against Thompson began with the filing of a complaint on May 21, 2003. On July 22, 2004, the trial court ordered the proceedings suspended pursuant to section 1368.[8]

Thompson was examined by two psychologists over the next few months. On August 6, 2004, Dr. Michael Jones concluded that Thompson likely had "some cognitive impairment," but that it was not severe enough to render him incompetent to stand trial. Dr. Jones also thought it was highly likely that Thompson was malingering.

In his September 22, 2004 report, Dr. Robert Perez concluded, "**very** tentatively," that Thompson was competent. Dr. Perez repeated this conclusion in a letter dated October 31, 2004.

The trial court declared Thompson competent on December 8, 2004, and reinstated the proceedings.

However, on March 18, 2005, the trial court again suspended proceedings pursuant to section 1368. Dr. Perez again examined Thompson and found him incompetent. Dr. Perez noted the prior reports of malingering, but indicated that he was

[8] Section 1368 states in relevant part: "(a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. . . . [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. . . . Any hearing shall be held in the superior court. [¶] (c) . . . [W]hen an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined."

inclined to err on the side of allowing Thompson to receive additional treatment in light of the severity of the charges. After the Harper Medical Group provided a similar recommendation, the trial court ordered Thompson committed to the Napa State Hospital on June 1, 2005.

In a letter dated August 18, 2005, the state hospital opined that Thompson was incompetent, but that there was a substantial likelihood he would regain competence in the foreseeable future. The hospital also noted that Thompson had, in prior psychological testing, given indications of malingering and that the hospital would "observe for behavioral inconsistencies."

In late September 2005, the state hospital certified Thompson as competent, noting there was strong evidence that he had been "malingering cognitive impairments and psychotic symptoms." Trial proceedings were reinstituted on October 19, 2005.

On May 11, 2006, the proceedings were again suspended pursuant to section 1368. Thompson was examined and, in a letter dated May 23, 2006, declared incompetent by Dr. Paul Koller. Dr. Koller stated that Thompson suffered from "severe depression with some degree of psychotic thought process. His educational history suggests long-standing cognitive impairment." Dr. Koller further noted that "[Thompson] does not appear to understand or care about the possible consequences he faces, and he presents himself as incapable of working with his attorney to develop an appropriate legal strategy." Given that Thompson's mother was critically ill, Dr. Koller was also concerned that Thompson might commit suicide.

A week later, on May 30, 2006, Dr. Koller prepared a second report revising his prior analysis and finding Thompson competent. Dr. Koller explained this revision based on his receipt and review of Thompson's prior evaluations at the Napa State Hospital, as well as the reports of Drs. Perez and Jones. Dr. Koller wrote that "any apparent inadequacies [in Thompson's intellectual capacity] are volitional in nature and represent a conscious decision on his part to avoid prosecution."

Dr. D. Ashley Cohen evaluated Thompson and prepared a report on August 11, 2006, in which she stated that Thompson's test results showed that he was "attempting to feign both psychotic and nonpsychotic symptoms, to an extreme degree, and seeking to present himself as grossly impaired." Dr. Cohen concluded there was a "very high likelihood of certainty that much of [Thompson's] presentation and test responses . . . were inaccurate, fabricated or intended deliberately to mislead." She agreed that Thompson was competent to stand trial.

b. February 2008 wrist-cutting incident and related proceedings

The parties appeared in court on February 13, 2008, for jury selection and in limine motions. Thompson's counsel declared a doubt as to his competence to stand trial, stating that he had refused to cooperate with her with respect to calling mental health professionals to testify on his behalf. She stated that the "only reason . . . a person would refuse to do that . . . would be that he doesn't understand the nature of the proceedings and he doesn't understand the difference between a first-degree and second-degree murder and, perceivably, a manslaughter." Given his "flat affect, his lack of speech, his obvious depression," Thompson's counsel believed that he "just [does not] understand what is happening to him."

The trial court, noting that prior evaluations had shown that Thompson was both competent and disposed to malinger, refused to suspend the proceedings.

Two days later, during a break in the morning's proceedings, Thompson was in a holding cell where he used a piece of metal to cut his wrists. His attorney told the court that he was feeling suicidal and depressed, and noting that he had expressed suicidal ideations in the past, asked that the court declare a doubt about Thompson's competence. She further noted that the timing of this act was further evidence of his incompetence, since "a person who could think two to three steps ahead would not want to select a jury with a bloody sleeve. He does not understand the importance of making a good impression on the jurors."

The trial court responded that it had had the opportunity to observe Thompson over the past few days, and noted that "[o]ccasionally we've had some eye contact when he's looked up, not knowing whether or not I was looking at him. And based on those brief glances as I've indicated previously I saw intelligence and alertness." The trial court also indicated that the prior psychological evaluations indicated that Thompson was malingering.

The court found that Thompson's lack of communication is volitional and that he has the ability to understand what was occurring in the courtroom. The court acknowledged that the jurors may have seen blood on Thompson's shirt or hands, and offered to accommodate any efforts to obtain clean clothes for him. Despite this, the trial court found no reason to declare Thompson incompetent.

At the start of the afternoon session that day, the trial court elaborated on its prior decision, noting the earlier reports of malingering by Thompson, and stating that, "[Thompson] did recently . . . attempted [*sic*] to scratch his wrists. I, quite frankly, do not want to define that as an attempted suicide. I've looked at the photographs. I have not looked at the defendant's wrist. But the bailiff who is in our department today, they took photographs of the defendant's wrists. I'm looking at the picture of that photograph [*sic*]. These are scratches. The instrument that was used was a very small piece of metal. . . . In looking at these scratches, and based upon the observation of this injury, I do not believe it is substantial enough that the defendant could not assist his attorney during the course of this trial. [¶] I've already put on the record my observations of the defendant. . . . I saw intelligence; I saw alertness; and I saw competence. [¶] Unless there is something more substantial brought to my attention, I am declaring the defendant competent to stand trial."

Thompson's counsel objected, stating that the time she had to spend caring for Thompson instead of focusing on the facts and evidence in the case substantially compromised her duties as a defense attorney under the Sixth Amendment and that

Thompson's due process rights were violated. The trial court disagreed, noting that Thompson's counsel was a good attorney, fully competent and prepared to proceed, and added that Thompson's due process rights had been observed as he had been repeatedly sent for evaluation with the same results. The trial court also observed that Thompson had no history of self-mutilation.

On February 28, 2008, the trial court made a further record in support of its decision by adding the following documents to the record: (1) a risk assessment from the Santa Clara County Sheriff's Office, dated February 21, 2008; (2) two handwritten notes by Sheriff's Deputy Nate Corrick concerning conversations he had had with Thompson on February 20 and 21, 2008; and (3) a photograph which the court described as having been "taken on the date of the incident in which . . . Thompson had scratched his wrist."

The risk assessment summarized Thompson's custodial history, noting that he had never made any prior attempts to injure himself, other inmates or jail staff.

Deputy Corrick, in his first note, indicated that he escorted Thompson to the holding cell during a 15 minute recess in the trial on February 20, 2008. As Deputy Corrick was walking away, Thompson called him back to the holding cell and asked to speak to his attorney. Later in the day, while again taking Thompson to the holding cell, Thompson asked Deputy Corrick if he was familiar with automatic weapons. When Deputy Corrick replied that he was familiar with semi-automatic pistols, Thompson began questioning him about the legitimacy of Green's testimony that day and if it were possible for the handgun used in the crimes to jam. He also asked why there was no evidence or signs of injury to Green from being hit with the butt of the handgun. Deputy Corrick noted that Thompson spoke clearly, and that his demeanor "changed from the courtroom to the holding cell. Thompson looked up at my face when we spoke and he was able to hold a conversation."

The second note, dated February 21, 2008, indicated that Deputy Corrick was taking Thompson back to the holding cell and was placing a waist chain on him, when

Thompson said, "That's what happens when you're on drugs." Deputy Corrick asked if Thompson was referring to the murder of his girlfriend, to which Thompson responded that he was on steroids at the time. When asked what steroid, Thompson could not identify it. When asked if he needed anything, Thompson asked for a glass of water.

The trial court indicated that these notes provided "insight [*sic*] to the fact [Thompson] was following what was going on in this trial," and that he could assist his counsel if he chose to do so. In response, Thompson's counsel said that his statement to the deputy that he was on drugs at the time of the shooting when he had never said any such thing to her indicated that he did not understand her role as his defense attorney. The trial court ultimately concluded that Thompson was "highly competent and would have been able to assist [defense counsel] if he had made that choice. He did not."

2. Competency to stand trial

Section 1367, subdivision (a), provides: "A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

Section 1367 embodies the federal constitutional principle that a defendant "may not be put to trial unless he ' "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him." ' " (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354.)

The principles in section 1367 are implemented by sections 1368, 1368.1, and 1369 which generally provide that, if a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall order that the question of the defendant's mental competence be determined at a hearing after the defendant has been examined by an appropriate expert appointed by the judge.

Although section 1368, subdivision (a) refers to a doubt that arises "in the mind of the judge as to the mental competence of the defendant," case law interpreting this subdivision establishes that when the court becomes aware of substantial evidence which objectively generates a doubt about whether the defendant is competent to stand trial, the trial court must on its own motion declare a doubt and suspend proceedings even if the trial judge's personal observations lead the judge to a belief the defendant is competent. (*People v. Pennington* (1967) 66 Cal.2d 508, 518; *People v. Jones* (1991) 53 Cal.3d 1115, 1153.) Due process requirements are not satisfied if the court merely takes the " 'evidence to guide him in determining if he should declare the existence of a "doubt" ' " as to the defendant's competency; the trial court has no discretion on whether to order a competency hearing once there exists substantial evidence giving rise to a doubt regarding competency. (*People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 69.) If a trial court proceeds without holding a competency hearing, the defendant has been deprived of his or her due process right to a fair trial, the trial court has acted in excess of its jurisdiction, and the judgment is a nullity. (*Id*. at pp. 70-71; *People v. Hale* (1988) 44 Cal.3d 531, 541.)

"[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required [and] . . . even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." (*Drope v. Missouri* (1975) 420 U.S. 162, 180.) Mere bizarre statements or actions are generally insufficient to constitute substantial evidence raising a doubt as to the defendant's competency. (*People v. Burney* (1981) 115 Cal.App.3d 497, 503.) Nor are " 'statements of defense counsel that defendant is incapable of cooperating in his defense [citation] or psychiatric testimony that defendant is immature, dangerous,

psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense.' " (*People v. Davis* (1995) 10 Cal.4th 463, 527.)

"When, as here, a competency hearing has already been held and the defendant was found to be competent to stand trial, a trial court is not required to conduct a second competency hearing unless 'it "is presented with a substantial change of circumstances or with new evidence" ' that gives rise to a 'serious doubt' about the validity of the competency finding." (*People v. Marshall* (1997) 15 Cal.4th 1, 33.)

"The trial judge's ruling regarding whether a competency hearing is required should be given great deference. 'An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.' " (*People v. Danielson* (1992) 3 Cal.4th 691, 727, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Thompson argues that the wrist-cutting episode and his indifference to his counsel's attempts to develop and introduce favorable evidence presented new and substantial evidence bearing on the issue of his competence to stand trial. We disagree with this analysis.

The court here was justified in finding that Thompson's act of cutting his wrist while in the holding cell and his supposed indifference to his defense did not amount to substantial evidence giving rise to a doubt that Thompson was no longer competent to stand trial. In declining to suspend proceedings and hold a further competency hearing, the trial court relied on the following: (1) a photograph of Thompson's injuries, which the trial court noted consisted of "scratches," and not a true suicide attempt; (2) the trial court's observations of Thompson in court, where he appeared intelligent and alert; (3) the prior psychological evaluations which found that Thompson was malingering in an attempt to delay or avoid criminal prosecution; (4) the risk assessment from the Santa Clara County Sheriff's Office summarizing Thompson's custodial history which showed

that he had never attempted to injure himself, other inmates or jail staff; and (5) the notes from Deputy Corrick reflecting his interactions with Thompson as he escorted him to the holding cell on two separate days. The trial court found that all of this evidence supported a finding that Thompson was competent and we find no reason to disturb the trial court's ruling on this matter.

III. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.